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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 262

PEERLESS STAGES, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and THE GREYHOUND CORPORATION

Appeal from the United States District Court for the Northern District of California

BRIEF IN OPPOSITION TO THE MOTIONS TO AFFIRM

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Pursuant to Rule 16(3), appellant files this brief in opposition to the two motions to affirm; the motion filed by the United States and the Interstate Commerce Commission will hereinafter be referred to as "Govt.", the one filed on behalf of Greyhound as "Gill".

I. THE COMMISSION CONDONED DISCRIMINATIONS AND PARTICIPATION IN REBATING ON GREYHOUND'S PART THAT WERE ESTABLISHED BY THE UNCONTRADICTED TESTIMONY OF GREYHOUND'S GENERAL TRAFFIC MANAGER

The present appeal asserts, with full documentation (J. S. 3-19), that the Commission in its preference for the larger carrier — Greyhound — overstepped the limits of impartiality, and condoned serious discriminations as well as participation in a flagrant instance of rebating.

Peerless is not challenging any of the findings set forth in the Commission's report (J. S. App. A2-A17), as appellees seem, however vainly, to hope (GH 9; Govt. 9). Peerless complains, not of the findings that were made, but of the findings that should have been but were not made. The thrust of Peerless' contentions is that the Commission's report conceals, because making no findings upon, material matters testified to without contradiction by Greyhound's own General Traffic Manager, all of which are adverse to Greyhound. (Whether this is an instance of *post hoc propter hoc* is not for us to say.)

The record shows discrimination in rates, discrimination in service, and participation in rebating, as follows:

Discrimination in rates: Greyhound's General Traffic Manager, Hastings, frankly admitted that while Greyhound quoted the Wagon Wheel $8.80 for each passenger as the round trip fare between San Francisco to Stateline, it quoted the competitor casino, Harrah's Club, only $6.77 per passenger for the same trip (Tr. 420, 450, 451). The Commission now says that this was not a discrimination because the first rate was "normal regular route operations" while the second represented "special operations" (Govt. 7-8). But Hastings' testimony quite fails to rest the fare difference on the character of the service (Tr. 451):

"Q. So that when Mr. Hardy [Wagon Wheel's representative, Tr. 322] asked you for the fare to Stateline, you quoted him $8.80, but when you commenced the Harrah's Club operations, you put in a special tariff fare of only $6.77; isn't that true?

"A. That's right."

And neither the Examiner nor the Commission deemed this obvious disparity in rates sufficiently important to warrant mention, much less to attempt to justify it on the ground now advanced by the Commission at Govt. 7-8.

The Commission also argues (Govt. 8) that "Since publication of the tariff for special operations, Greyhound has made the same rates available to all casinos at any geographical location (Tr. 338-339, 422-423)." The quoted record references are instructive. At the page first mentioned, Tr. 338, Hardy of the Wagon Wheel testified to being told by Hastings for Greyhound "that it wouldn't be advisable to operate out of the same terminal" with Harrah's Club. And at the page preceding the second citation, Tr. 421, Hastings admitted telling Hardy that "the Wagon Wheel would come out ahead by starting their service out of some points where Harrah's Club was not operating service." Yet the Commission here asserts (Govt. 7) that "There is nothing in the record indicating that Greyhound discriminates in rates or service between the casinos"!

Discrimination in service: (1) Notwithstanding the denial just quoted from its Motion to Affirm, the Commission in its report admitted Greyhound's discrimination in respect of the better equipment that it furnished the larger casinos: see J. S. App. A16, where the Commission said that Greyhound "concedes that it might be better disposed to the casino which attracts the most patrons and utilizes its service more often, if a decision pertaining to the assignment of vehicles might become necessary." This finding rests on Hastings' admissions at Tr. 455-456.

(2) Greyhound's favoring of Harrah's Club over its Stateline neighbor the Wagon Wheel (Tr. 326, 330, 378) by discouraging the latter from attempting to operate out of the same terminals has already been noted, just above.

(3) The third service discrimination consists in Greyhound's giving two large casinos rent-free booth space in its terminals (J. S. 4, citing Hastings' testimony at Tr. 443, 444, 445-446, 448). It is true that Greyhound expressed formal willingness to permit all other casinos similar privileges (Govt. 8; J. S. 5), but this was expressly qualified by Hastings (Tr. 446), "up to our ability to provide that space." Inasmuch as there are, all told, some 40 casinos involved (J. S. 5), it is obvious that Greyhound's expressed willingness to extend equal booth privileges to all in its terminals is a meaningless expression of generalized goodwill quite impossible to be performed. Even Greyhound's man admitted (Tr. 447) that "I wouldn't judge whether we could put in two or more or ten more."

Participation in rebating: The Commission interposes a blanket denial, saying (Govt. 8):

> "The claim that Greyhound participates in rebating has no foundation in fact. Greyhound collects its total published tariff charge for the service rendered and does not refund any portion to the passengers or the casinos (Tr. 441-442)."

But the Commission's denial is effectively destroyed by the very reference offered to support it; here is what Greyhound's General Traffic Manager testified at the pages cited (Tr. 441-442):

> "The ticket actually reads to Stateline, but the tickets which the passengers who are going to Harrah's Club purchase are a special ticket made up and printed by Harrah's Club which contains coupons for our transportation on our line which read: 'From San Francisco to Stateline' and 'From Stateline back to San Francisco.'

> *"In addition, there is included in this ticket a coupon which is presented by the passenger at Harrah's Club to the cashier for whatever refund they care to make."*

In view of the last paragraph quoted, which we have undertaken to italicize, it is plain that Greyhound's agent sells a ticket at the tariff rate which gives the Harrah's Club passenger something of value over and above the cost of the transportation. This is just as much a participation in rebating as if the D. C. Transit system were to give its Woodward & Lothrop passengers an extra premium card redeemable at that store in return for the same fare at which it sold only tokens to its Hecht or Garfinckel passengers. In each instance, the particular passenger gets a bonus that others paying the same tariff rate are not given.

It makes no difference whether the agent selling the three-coupon ticket described by Greyhound's witness is employed by Greyhound or by Harrah's Club. Greyhound can no more insulate itself from such a palpable violation of the rebating provisions of the Interstate Commerce Act by participating with another to reach the prohibited result, than the New York Central could, by making a trackage agreement with the Cleveland Stock Yards, effectuate a discrimination against a consignee of livestock that it was admittedly disabled from perpetrating on its own. *United States* v. *Baltimore & O. R. Co.*, 333 U. S. 169.

All of the matters complained of above rested on the testimony of Greyhound's General Traffic Manager. On some he was corroborated; on none was he contradicted. Yet with the sole exception of the preference accorded the larger casinos in respect of the better equipment furnished (J. S. App. A16), the Commission made no findings respecting any of them. That indisputable and uncontrovertible fact demonstrates and underscores the Commission's consistent bias in favor of Greyhound far more eloquently than anything we could add by way of gloss.

II. HERE THE COMMISSION CUT OFF AN EXISTING SERVICE FOR THE STATED REASON THAT GREYHOUND, A FAR LARGER CARRIER THAN APPELLANT, REQUIRED PROTECTION FROM "NEW COMPETING SERVICE"

The basic question presented (J. S. 2) is "Whether the Interstate Commerce Commission may cut off an existing service on the footing of protecting a carrier from 'new competing service' ", and not, as misstated by Greyhound (GH 2), simply whether the Commission acted properly in denying Peerless' application "upon the ground that no showing had been made that the existing carriers are unwilling and unable to meet the public's reasonable transportation needs within their authorized territories."

The heart of this case is that Peerless originally carried on, as authorized "charter operations" that its operating head considered legal (Tr. 261, 262), the same traffic that it now seeks to transport under the rubric of "special operations". If Peerless had been an utter newcomer to the field, then, plainly enough, it could probably never, with any foreseeable chance of success, have obtained entry thereto. But it was in no sense a newcomer, having carried some 32,000 persons during a 15-month period over the routes now in question; and so the Commission found (J. S. App. A6).

The Commission avoids Greyhound's error—if only by failing to formulate any "Question Presented". The Commission here admits, as it must, the central fact that Peerless was not new to the field; and the Commission faces up to Peerless' contentions, at least to the extent of asserting (Govt. 5) that "The flaw in appellant's argument is that it would overlook the illegality of the operations sought to be relied on."

Not at all. In failing to contest further the district court's approval of the Commission's cease and desist order, Peerless simply recognized that this Court does not sit to hold the Commission's pen when the somewhat

blurred line between "charter operations" and "special operations" is to be drawn. To that extent—and for that reason—Peerless acquiesced in the ruling that its activities in conjunction with Travis fell beyond the scope of "charter operations".

None the less, Peerless asserts that the line between "charter operations" and "special operations" is an indistinct one (see J. S. 10-11, 16-17), as indeed the Commission recognized in distinguishing (J. S. App. A10, A11) its own prior ruling in *Snodgrass Broker Application*, 76 M. C. C. 739, a case very close to this one on the facts, and one which assuredly led Peerless to believe that Travis did not need a broker's license. Moreover, the Commission here, while contending and citing cases for the proposition that the distinction between "charter operations" and "special operations" is a clear one (Govt. 6), does not once undertake to formulate the difference—an omission going even a step beyond the non-so-apocryphal law professor's comment on a gossamer line that had been drawn: "I can state it, but don't ask me to repeat it."

We submit that Peerless' failure to guess correctly on which side of the "charter operations", "special operations" line its activities would ultimately be held to fall in the present setting, particularly where it succeeded to another carrier's similar earlier service (Tr. 68-69, 262-263) that had been explained to and apparently never questioned by the Commission (Tr. 102-103, 106, 108, 110), does not deserve, and cannot fairly receive, the blanket condemnation of "illegality" (Govt. 5). Instead of being thus stigmatized, Peerless should rather be commended for having sought to regularize its position after the Commission had, by bringing a premature suit, indicated dissatisfaction therewith (J. S. 7). Peerless should no more be penalized for its error of law in misapprehending the scope of *Snodgrass Broker Application*, 76 M. C. C. 739, than the Commission has been disadvantaged for having originally carried to the courts a

matter that was properly the subject of administrative determination in the first instance. To suggest the contrary is all but to resurrect the rigidity of the medieval common law before the first statute of jeofails.

In that setting, it is surely no answer for the Commission to block Peerless' present effort at regularization by calling its existing traffic "new competing service", and thus virtually to preclude relief. Such a step, such a descent into the jurisprudence of labels, is more than (GH 6) an "exercise of judgment". It goes to power—and the Commission has no power to assimilate existing service to new service in the "exercise of judgment" or the "exercise of discretion" (*id.*).

When the Commission held that Peerless' existing traffic constituted "new competing service" against which Greyhound must be protected, it decided a question of law—and, in the present context, a substantial question of law.

III. THE RULING BELOW SHOULD BE REVIEWED BECAUSE IT APPROVES THE PRECISE KIND OF SPECIAL FAVORITISM AGAINST WHICH THE INTERSTATE COMMERCE ACT WAS DIRECTED

Notwithstanding the unquestioned rule that the Interstate Commerce Act and all amendments thereto "have aimed at wiping out discriminations of all types" (*United States* v. *Baltimore & O. R. Co.*, 333 U. S. 169, 175), it is clear that in the present case the Commission has put out of view the substantial discriminations practiced by Greyhound while pushing into view the technical violations by Peerless based on the latter's failure accurately to predict that, despite *Snodgrass Broker Application*, 76 M. C. C. 739, Travis would be held a broker rather than an agent of the casinos for which he sought customers.

And the court below, by rigidly adhering to stereotyped formulas of judicial review, similarly ignored the far more serious violations by Greyhound to which the Commission studiously closed its eyes. By thus emphasizing names

rather than realities, by thus reverting to an easy technique whose shortcomings were long since exposed, see Pound, *Mechanical Jurisprudence*, 8 Col. L. Rev. 605 (1908), the ruling now sought to be reviewed conceals—and encourages—precisely the kind of special favoritism that the Interstate Commerce Act was designed to outlaw.

We realize, of course, that this Court cannot undertake to review every run-of-the-mill motor carrier case. But we think that the present example of both administrative and judicial blindness to obvious and uncontradicted discrimination falls so far below any tolerable level of alleged or assumed expertise as to call for further scrutiny here.

CONCLUSION

For the foregoing additional reasons, probable jurisdiction of this appeal should be noted.

Respectfully submitted.

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